2001-014-360

ITT Industries
Engineered for life

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General Services Administration
FAR Secretariat (MVR)
1800 F Street, NW
Room 4035
Attn: Laurie Duarte
Washington, D.C. 20405

Dear Ms. Duarte:

Re: FAR Case 2001-014

The following comments are submitted on behalf of ITT Defense, a unit of ITT Industries, Inc. ("ITT"), in response to the FAR Council's request for comments on its proposal to revoke the December 20, 2000 rule on contractor responsibility. The annual revenues of ITT Defense are in excess of $1 billion. ITT is strongly in favor of revocation of the December 20, 2000 rule.

The December 20, 200 rule, if promulgated, would disqualify companies for failure to demonstrate "satisfactory compliance with *the law* including tax, labor and employment, environmental, antitrust and consumer protection laws." Decisions concerning compliance with these laws, until now reserved for agency debarring officials, would be entrusted to the individual contracting officer.

The regulation does not require demonstration of any connection between compliance with these statutes and a bidder's record of integrity *as a contractor.* Nor does the rule make any allowance for remedial action by the contractor for alleged violations. Yet, the debarment regulations make the concept of *present responsibility* the touchstone of eligibility for contract award. Debarment and suspension, under those regulations, are to "be imposed only in the public interest for the Government's protection and *not for purposes of punishment.*"

Thus, the head of the agency cannot use debarment and suspension as a form of punishment. How, then, could the government justify conferring such power on each contracting officer in *responsibility determinations?* It cannot. These contracting officers, with no guidance, would be thrust into areas where they have neither training nor expertise. Even *unintentional* violations of laws unrelated to procurement, particularly in the environmental area, could be considered evidence of lack of integrity and business ethics. Moreover, with hundreds of contracting officers in the federal government, there would be wildly disparate treatment of contractors. So the question is not whether the government should do business with lawbreakers. Rather, the question is what procedures are best designed to protect the government's interest and insure fairness to its contractors.

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The rule would also place an unfair burden on companies by requiring them to research and certify compliance with a broad range of laws, on pain of suffering further penalties from an allegedly false certification. The burden is not eased by having a "check-the-box" certification. Because an incorrectly checked box may subject the contractor to criminal penalties, the contractor will need to perform the same internal review and due diligence required under the heavily criticized initial version of the rule. Moreover, if the contractor *has* committed any infraction in the past, it must provide an explanation—thereby eliminating any reduction of paperwork.

The lack of objective standards in the December 20, 2000 rule is especially troubling. The rule provides the contracting officer with a "hierarchy" of black marks to consider, from most serious to least serious: convictions, civil court judgments, administrative judgments and indictments. This "hierarchy" does not remove subjectivity. Indeed, the preamble to the rule says contracting officers "are not limited to considering only the listed violations" but also "must" consider additional information, including alleged violations of foreign and state law as well as civil or administrative complaints. Moreover, the contracting officer has the sole discretion to decide what is meant by "satisfactory compliance with the law," how many and what kind constitute "repeated, pervasive or significant" violations, and what is meant by "must consider relevant credible information."

Such policy decisions heretofore have properly been reserved for agency debarring officials, to be made after notice to the contractor and an opportunity to be heard. Indeed, court decisions and debarment regulations require no less. The December 20, 2000 regulation, however, provides only for notification to the contractor *after* the contracting officer eliminates the company from the competition. The contractor's only remedy would be an after-the-fact bid protest or lawsuit. Companies would be forced to repeat this process from agency to agency and even within the *same* agency. One contracting officer's decision would have no binding effect on another contracting officer, and each official could have separate views on the meaning of "satisfactory compliance," "credible information," "significant violations" and other terms, including the broad category "consumer protection laws," for which there is no guidance.

Finally, the changes in the December 20, 2000 rule regarding allowability of labor relations and legal costs compound the problem. Under this rule, costs of activities that "assist, promote or deter" unionization would be unallowable. This is purportedly designed to preserve neutrality. Yet, costs are *allowable* if they relate to "maintaining satisfactory relations between the contractor and its employees, including costs of shop stewards" and "labor management committees." These *are* activities that assist or promote unionization—this is not neutrality. In addition, costs are unallowable if they are "incurred in civil or administrative proceedings brought by a government where the contractor violated, or failed to comply with, a law or regulation." These costs are disallowed whether or not the charges involve fraud or misconduct or otherwise have any bearing on the company's integrity as a government contractor.

In short, agencies would have a vastly expanded, and largely subjective arsenal to use against disfavored contractors, and virtually no restraints on its use. The rule would disregard the time-honored notion that responsibility determinations must relate to the company's record of integrity *as a contractor.* In other words, the concept of present responsibility, until now imbedded in procurement law, would be abandoned. Contracting officers would be compelled to respond to alleged violations of virtually any law unrelated to the procurement process. Anyone with sufficient motivation could mount a crusade to disqualify a contractor for alleged violations of "the law" – federal, state or foreign – as decided by a single contracting officer. The contractor would be left with no semblance of due process.

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In its April 3, 2001 announcement, the Federal Acquisition Regulatory Council correctly identified reasons to revoke the rule entirely. In summary, (1) there is no justification for including in responsibility determinations coverage of laws such as tax, labor and employment, environmental, antitrust and consumer protection, (2) contracting officers would not have sufficient guidelines to prevent arbitrary or abusive interpretation, and (3) the rule cannot be justified from a cost/benefit perspective. Enforcement of the listed laws is the duty of the agencies responsible for them, and those agencies may cite a pattern of violations as a cause for debarment or suspension. Whether the contractor has demonstrated present responsibility through rebuttal or remedial action is for the agency's debarring official to determine after notice and hearing – the hallmarks of due process.

ITT commends the FAR Council for proposing to revoke the final rule and urges the Council to make the revocation permanent.

Sincerely,

Jack Mundt

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The government serves the public well if there is a mechanism to weed non-compliant contractors out of the process. Further defining the term "Responsible Contractor" and establishing an effective screening process would be a very positive step in the right direction.

The Coalition for Fair Contracting strongly supports the certification requirement in this revised proposal.

Where bidding companies would be required to disclose whether they have been convicted of or found liable for a violation of tax, labor, employment, environmental, antitrust, or consumer protection laws and to provide information on any or all such violations There is no other way for a contracting official or procurement officer to obtain the information they need to effectively evaluate a bidder's record of ethics and integrity. And to be truly effective this part of the process should apply to violations of any and all laws, be they federal, state or local.

In considering "all relevant credible information" pending legal proceedings along with final and completed legal proceedings may in certain appropriate circumstances constitute relevant and credible information. And should also be considered.

Finally, the Coalition supports the cost reimbursement reforms in the proposed regulations. It makes no sense to reimburse contractors for their legal costs when they lose or settle legal proceedings brought against them by the federal government. And it is a waste of taxpayer's money.

To currently address the issues, contractors and subcontractors must be required to submit documentation on their past performance during the bid process. Those that don't meet the government's requirements of "Responsible Contractor" need to be excluded. And those that falsify information need to be prosecuted and debarred from doing any publicly funded construction

The tax-paying public is demanding the "Best Value" for their tax dollar. And that means hiring the best contractors. That is not bad procurement policy that is "good business" pure and simple.

Contractors and subcontractors that have a history of legal compliance and have proper staffing and are investing in America's future by providing their work forces with adequate training and viable apprenticeship programs.

Contractors and subcontractors that will get the job done on time and within budget and provide a product that will last a lifetime.

Contractors that by their history and compliance with our laws have shown that they know the true definition of "Responsible."

Sincerely,

Michael J. McNelly
Executive Director